

Supreme Court, U. S.

FILED

OCT 20 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-705

WASHINGTON REEF NET OWNERS ASSOCIATION,  
*Petitioner*

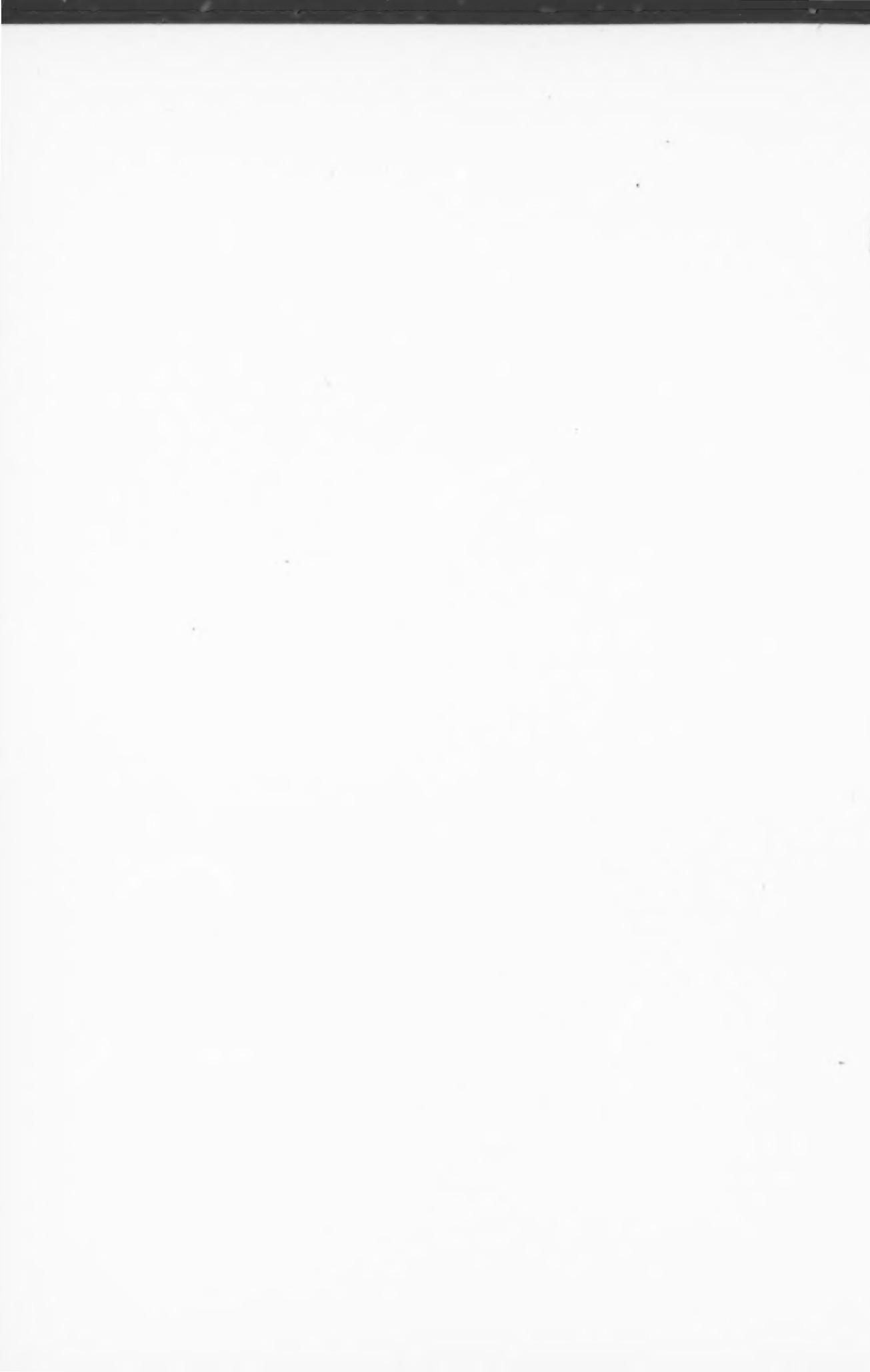
v.

UNITED STATES OF AMERICA, *et. al.*,  
*Respondents.*

*Petition of Washington Reef Net Owners Association  
For a Writ of Certiorari  
To The United States Court of Appeals  
For The Ninth Circuit*

ASMUNDSON, RHEA & ATWOOD  
David E. Rhea  
Suite 5, Bellingham Legal Center  
805 Dupont Street  
Bellingham, Washington

*Counsel for Petitioner*



IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1975

---

No. ....

---

WASHINGTON REEF NET OWNERS ASSOCIATION,  
*Petitioner*

v.

UNITED STATES OF AMERICA, *et. al.*,  
*Respondents.*

---

*Petition of Washington Reef Net Owners Association  
For a Writ of Certiorari  
To The United States Court of Appeals  
For The Ninth Circuit*

---

ASMUNDSON, RHEA & ATWOOD  
David E. Rhea  
Suite 5, Bellingham Legal Center  
805 Dupont Street  
Bellingham, Washington

*Counsel for Petitioner*

## INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED FOR REVIEW	2
TREATIES AND STATUES INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	12

## AUTHORITIES CITED

CASES	Page
<u>Cf. United States v. Choctaw Nations</u> , 179 U.S. 494, 45 L. Ed. 291, 21 S. Ct. 149	9
<u>Choctaw Nation or Indians v. United States</u> , 119 U.S. 1, 30 L. Ed. 306, 7 S. Ct. 75	8
<u>Choctaw Nation of Indians v. United States</u> , (1942) 318 U.S. 423	8
<u>Cook v. United States</u> , 288 U.S. 102; 77 L. Ed. 641; 53 S. Ct. 305	8
<u>Department of Game v. Puyallup Tribe</u> , 414 U.S. 44 (1973) (Puyallup II)	3
<u>Factor v. Laubenheimer</u> , 290 U.S. 276; 78 L. Ed. 315; 54 S. Ct. 191	8

<b>CASES</b>	<b>Page</b>
<u>Jones v. Meehan</u> , 175 U.S. 1 (1899)	7
<u>Kansas or Kaw Tribe of Indians v. United States</u> , 80 Ct. Cl. 264, (1934)	7
<u>Missouri v. Holland</u> , 252 U.S. 416 (1920)	7
<u>Northwestern Shoshone Indians v. United States</u> , (1944) 324 U.S. 335	7
<u>Osage Indians v. United States</u> , 279 U.S. 811	7
<u>Osage Tribe of Indians v. United States</u> , 66 Ct. Cl. 64, (1928)	7
<u>Puyallup Tribe v. Department of Game of Washington (Puyallup I)</u> , 391 U.S. 392 (1968)	3
<u>Tulee v. Washington</u> , 315 U.S. 681; 86 L. Ed. 1 115 62 S. Ct. 862	8
<u>United States v. Mille Lac Band</u> , 229 U.S. 498; 57 L. Ed. 1299; 33 S. Ct. 811	9
<u>United States v. Shoshone Tribe</u> , 304 U.S. 111, 82 L. Ed. 1213, 58 S. Ct. 794	8
<u>United States v. Winans</u> , 198 U.S. 371, (1905)	7

#### STATUTE AND TREATY

28 USC § 1254 (1)	2
12 Stat. 927 (Treaty of Point Elliott)	2

TEXTS AND OTHER PUBLICATIONS

	Page
Webster's American Dictionary of the English Language, 1828 and 1862 Editions	9

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1975

---

No. ....

---

WASHINGTON REEF NET OWNERS ASSOCIATION,  
*Petitioner*

v.

UNITED STATES OF AMERICA, *et. al.*,  
*Respondents.*

---

*Petition of Washington Reef Net Owners Association  
For a Writ of Certiorari  
To The United States Court of Appeals  
For The Ninth Circuit*

---

Petitioners, Washington Reef Net Owners Association, respectfully request that a Writ of Certiorari be issued from the United States Supreme Court to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered June 4, 1975, and the order denying application for rehearing en banc entered by said court on July 23, 1975.

### OPINIONS BELOW

The opinions of the Court of Appeals and of the District Court are included in the appendix attached to the petition previously filed with this Court by the petitioner State of Washington and they are herewith, by this reference, included herein.

### JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 4, 1975. A timely petition for a rehearing en banc was denied on July 23, 1975, and this petitioner's application for an extension of time was filed within ninety days of that date, namely, on October 20, 1975. This Honorable Court's jurisdiction is invoked under 28 USC § 1254(1), an interpretation of the Treaty of Point Elliott, 12 Stat. 927, being required.

### QUESTION PRESENTED FOR REVIEW

Are the present day reefnetters operating in what were, at treaty times, "usual and accustomed grounds and stations" of the Lummi?

### TREATIES AND STATUTES INVOLVED

Interpretation of the Treaty of Point Elliott, above referred to, is required and, for statutory justification for bringing this action, 28 USC § 1254(1) above quoted.

### STATEMENT OF THE CASE

This action was originally initiated by the United States of America, acting through the United States District Attorney for the Western District of Washington, against the State of Washington. Subsequently, many In-

dian tribes intervened as additional plaintiffs and the directors of the Washington State Department of Fisheries and the Washington State Department of Game thereafter intervened as additional defendants. The Lummi complaint in intervention, (Vol. 1, p. 75), sought, in effect, to have the State barred from issuing further licenses for reefnetting and to ban reefnetting, as it has been conducted in Puget Sound since 1934, from the areas presently in use upon the grounds that these were locations granted irrevocably to the Lummi by the Treaty of Point Elliott. The reefnetters, through their Association, applied to participate as a defendant-intervener (Vol. 1, p. 193), which right was ultimately granted to them. (Judge Boldt originally denied the application but, upon a motion for reconsideration, Judge Goodwin granted the intervention.) (Vol. 1, p. 204).

Thereafter, an answer was filed upon behalf of the reefnetters, (Vol. 1, p. 207), and the various issues between the Lummis and the reefnetters were set forth in the Final Pretrial Order, (Vol. IV, p. 766).

In disposing of these issues, the trial court ruled completely in favor of the plaintiffs, including the Lummis, such rulings being encompassed in the Final Decision, Findings of Fact, and Conclusions of Law, (Vol. VII, pp. 1515-1727).

The basis for the jurisdiction of the trial court is the existence of the Treaty and Statute above cited.

It is submitted, pursuant to the requirements of Rule 19, that a Writ of Certiorari should issue from this Honorable Court because the Court of Appeals decided the question affecting these petitioners in a way in conflict

with the prior decisions of this Court in the two Puyallup cases, namely, Puyallup Tribe v. Department of Game, 391 U.S. 392 (1968) (Puyallup I) and Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973) (Puyallup II), in the manner and fashion set forth in the Briefs of petitioners State of Washington and Northwest Steelheaders Council of Trout Unlimited. Furthermore, in deciding upon a strict formula for application of the Treaty of Point Elliott, and in holding that these petitioners were fishing upon the "usual and accustomed grounds and stations" of the Lummis at treaty times, the lower courts have decided an important question of federal law which has not been, but should be, settled by this court.

#### ARGUMENT

In order to determine what were the "usual and accustomed grounds and stations" for the taking of fish utilized by the Lummis at the time of the Treaty of Point Elliott, it is essential to determine how "reefnetting" was done by the Lummis at, and prior to, treaty times. At trial, the plaintiffs' principal anthropological witness, Dr. Barbara Lane, beginning at page 15 of USA Exhibit 30, described by quotes from Collins how reefnetting was done in 1888 and 1889. She continues the description by quoting, at page 17 of the said exhibit, from a manuscript written in 1951 by another anthropologist, Dr. Suttles. In it, Suttles notes that,

"Usually the reefnet was located in a kelp-covered reef a short distance offshore. Often it was opposite a headland that caused a backward sweep of tidal current. The fish entered with the current. If the location were in kelp

bed, a channel was cleared so that the fish swam into the channel and into the hidden net. If there were no kelp, the illusion of a channel was created by hanging weeds on lines leading to the net."

More contemporary descriptions of how reefnetting was done by the Lummis in earlier times appears in Reefnetters exhibits, RN 12, RN 13 and RN 14, all three of which are affidavits from Indians given in an early trial held in 1896 and 1897 in the Circuit Court of the United States, District of Washington, Northern Division, i.e., Seattle, wherein the United States, upon behalf of various Lummis sought to restrain the Alaska Packers Association and an adjoining land owner, Kate Waller, from installing fish-traps—then legal, but illegal in this state since 1934—where it interfered with the reefnet operations of the Lummis at Point Roberts at the northern part of Puget Sound.

RN 12 is the affidavit of a Lummi, Jack Sumptilino. On page 1 thereof, he states that he is more than 85 years old and that he had fished [i.e., reefnetted] at Point Roberts since he was so small and young that he could not recollect the first time he fished there. He specifically states,

"We fished on the reef with nets made of young willow and for anchor ropes we used ropes made out of cedar withes and bark;"

RN 13 is the affidavit of one John Elwood—not a Lummi—who states, at page 1, that the salmon caught by the Lummis passed over and near Village Point reef on Lummi Island a distance of about two miles from the

Lummis' reservation, then to Point White Horn and thence to Point Roberts which is more than thirteen miles north of the reservation. He further adds,

"That the only places in the course of the run of such salmon where they can be taken by hand nets such as are now and have been from time immemorial used by the Indians is on the reefs over which they cross and at such places on such reefs where the water is not to exceed two fathoms in depth; at Village Point and at Point Roberts are the only places in the waters of the lower Puget Sound or Gulf of Georgia where the Indians can catch them;"

RN 14 is the affidavit of Harry Sewalton, a Lummi, who states at the top of the fifth page of his affidavit,

"Affiant further says that the said Point Roberts reef and the reef at Village Point on Lummi Island in Whatcom County, are the only two reefs in the waters of said county or in the lower Sound upon which the said Lummi Indians could take salmon with hand or lift nets; that at Village Point the reef is very short and abrupt and it is possible for said Indians to use at most but few nets upon such reef;"

(All underlining in the preceding paragraphs has been done by this writer.)

Contemporary methods of reefnetting are set forth in the Transcript of the trial testimony of Jerry Anderson beginning at page 3685 through line 3, page 3695, (Vol.

XVI). A further description of the equipment used and the manner of operation appears in RN 1, the pretrial deposition of reefnetter, John R. Brown, from page 55 through page 69 thereof.

An accurate description of the depths needed for present day reefnetting operations appears in Exhibit RN 9, the direct testimony of Laurence G. Waters. Also in his trial testimony commencing at page 3729 of the Transcript and through page 3732, (Vol. XVI).

The location of the present day gears, and their appearance and operation, is set forth in Exhibit RN 7, which is an aerial map of Legoe Bay, the present principal reefnetting ground. Exhibit RN 8, an overlay, is also of assistance in showing the locations of the various rows and the depths.

We are then confronted with the question, how liberally may Indian treaties be interpreted?

There are various statements in cases such as Jones v. Meehan, 175 U.S. 1 (1899), and United States v. Winans, 198 U.S. 371, (1905), and Missouri v. Holland, 252 U.S. 416, (1920), that the treaties should always be liberally construed for the benefit of the Indians.

There have been other statements, however, from the United States Supreme Court and other Federal Courts putting limits to this rule. Kansas or Kaw Tribe of Indians v. United States, 80 Ct. Cl. 264, (1934), cert. denied, 296 U.S. 577; Osage Tribe of Indians v. United States, 66 Ct. Cl. 64, (1928), appeal dismissed and cert. denied; Osage Indians v. United States, 279 U.S. 811, all held that courts must accept the treaties as written and cannot alter or amend them.

In *Northwestern Shoshone Indians v. United States*, (1944) 324 U.S. 335, at p. 353, Justice Reed, writing the majority opinion, states,

"We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for Congress."

Justice Jackson concurring for himself and Justice Black, states, in the same case at p. 356, while addressing himself to the question of the liberal interpretation of Indian treaties,

"Even if both parties to these agreements were of our own stock, [i.e., non-Indian], we being a record-keeping people, a court would still have the gravest difficulty determining what their motives and intensions and meanings were. Statutes of limitation cut off most such inquiries, not because a claim becomes less just the longer it is denied, but because another policy intervenes—the policy to leave in repose matters which can no longer be the subject of intelligent adjudication."

(Emphasis supplied.)

In *Choctaw Nation of Indians v. United States*, (1942) 318 U.S. 423, at p. 431, Justice Murphy stated,

"Of course treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construc-

tion adopted by the parties. Factor v. Laubenheimer, 290 U.S. 276, 294, 295, 78 L. Ed. 315, 324, 325, 54 S. Ct. 191; Cook v. United States, 288 U.S. 102, 112, 77 L. Ed. 641, 646, 53 S. Ct. 305. Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the same sense in which the Indians understood them, and ‘in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.’ Tulee v. Washington, 315 U.S. 681, 684, 685, 86 L. Ed. 1115, 1119, 1120, 62 S. Ct. 862. See also United States v. Shoshone Tribe, 304 U.S. 111, 116, 82 L. Ed. 1213, 1218, 58 S. Ct. 794; Choctaw Nation v. United States, 119 U.S. 1, 28, 30 L. Ed. 306, 315, 7 S. Ct. 75. But even Indian treaties cannot be re-written or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties. Cf. United States v. Choctaw Nations, 179 U.S. 494, 531, 533, 45 L. Ed. 291, 305, 306, 21 S. Ct. 149; United States v. Mille Lac Band, 229 U.S. 498, 500, 57 L. Ed. 1299, 1302, 33 S. Ct. 811.” (Emphasis supplied.)

We must then abide by the plain, clear meaning of the key words already quoted above—“at all usual and accustomed grounds and stations” and “in common with all other citizens of the Territory.”

Next we must consider what is the meaning to be given

the treaty words, "usual and accustomed fishing grounds and stations".

As the court points out in his Finding of Fact No. 24, beginning at p. 19 of the Findings of Fact, (Vol. VII, p. 1597) the meanings intended by the treaty commissioners were those appearing in the dictionaries then extant. Further, we are in full agreement with that portion of Finding No. 24 which appears at the top of p. 20 of the Findings of Fact that the words "usual and accustomed" were probably used in their restrictive sense, not intending to include areas where use was occasional or incidental.

Let us requote then the meanings for the two words "usual" and "accustomed" as they appeared in the 1828 and 1862 editions of Webster's American Dictionary of the English Language set forth in the Finding:

"usual              Customary; common; frequent,  
                        such as occurs in ordinary prac-  
                        tice or in the ordinary course  
                        of events.

accustomed: Being familiar by use; habituated; inured . . . usual; often practiced."

Applying the meanings, as thus established, to the question of whether or not the Reefnetters, as they presently are functioning, are invading Indian Treaty rights—which is the essence of the dispute between the Lummis and the Reefnetters—we cannot but conclude that in no wise are the areas of Legoe Bay now used for reefnetting either "accustomed" or "usual" "fishing grounds or stations" of the Lummis at Treaty times. The very prim-

itive equipment the Lummis were using at that time, plus the shallow depths and limited locations in which they were compelled to function, totally excludes any argument that reefnetting, as now conducted with several eight ton anchors per vessel, heavy steel cables, substantial depths, and strong tidal problems, is any wise upon "grounds or stations" utilized by the Lummis at Treaty times. In other words, a totally new and entirely different fishing ground has been developed by present day reefnetters in the operations as they are now carried on.

The foregoing conclusion is bolstered further by the last sentence in the court's Finding No. 24, to-wit,

"The restrictive sense of the terms "usual and accustomed" could have been conveyed in Chinook Jargon."

The Indians, in other words, were intending only to convey an interest in what they were then presently enjoying, i.e., the use of "but few (See Exhibit RN 14, p. 5) locations at Village point (which is at the north end of Legoe Bay) and the others at Point Roberts—an area not in dispute in the present suit.

That present day reefnetters are in no wise utilizing areas used by the Lummis at Treaty times is reinforced further by much other of the testimony or exhibits:

(a) Dr. Barbara Lane concedes, in the Transcript of her testimony at p. 2156, ls. 12-15, (Vol. X, p. 2156), that she is unable to state whether the present reefnet locations are in locations which would have been used by the Lummi Indians.

(b) Exhibit RN 7 shows that the area now utilized

for present day reefnetting is large and extensive. Yet the affidavit of Harry Sewalton, Exhibit RN 14, in the first paragraph of p. 5, states,

“At Village Point [which is at the northern end of Legoe Bay] the reef is very short and abrupt and it is possible for said Indians to use at most but few nets upon such reef;”.

(Underlining supplied.)

(c) The affidavit of John Elwood, Exhibit RN 13, from the same federal court action states, in speaking of the use by the Lummis of their nets,

“[nets] such as are now and have been from time immemorial used by the Indians are on the reef over which they cross and at such places on such reefs where the water is not to exceed two fathoms in depth.” (Underlining supplied.)

(d) The affidavit of Jack Sumptilino, Exhibit RN 12, in referring to the material used for nets and anchor ropes states,

“We fished on the reef with nets made of young willow and for anchor ropes we used ropes made out of cedar withes and bark;”

(e) Even Lummi witness, Herman Olsen, states at p. 2955 of the Transcript of his testimony, (Vol. XIII, p. 2955), that the cedar ropes were only twenty feet long. He repeats this statement on the succeeding page of his testimony, 2956.

(f) Such ropes were, therefore, not only far too short to have enabled them to fish at the depths shown in the testimony of Laurence G. Waters, (Vol. XVI, pp.

3729-3732), but they would not have had the strength of the three-quarter inch steel cables nor the one and one-eighth inch synthetic lines now used for anchor lines., Tr. pp. 3699, 3700, (Vol. XVI, pp. 3699-3700). They could not have sustained thirty-two tons of anchors such as are now used in front, (l. 2, p. 3704, Vol. XVI). Four experienced reefnetters, Jerry Anderson, Warren C. Granger, John R. Brown and Glenn Schuler, stated positively and unequivocably, (Vol. XVI, pp. 3695, 3698; Vol. XVI, p. 3739; Vol. XVI, p. 3763; Vol. XVI, pp. 3768, 3769), that in their opinions pre-Treaty reefnet boats owned by the Lummis could not possibly have fished in the areas now used with the lines and anchors then available because of the extreme tidal conditions which sometimes prevail and the depths in which the operations are conducted.

Obviously and unquestionably, therefore, in view of the foregoing points, present day reefnetting is being conducted in an area which would never have been capable of use by pre-Treaty Lummis and which is not, therefore, within an area which may ever have been a "usual or accustomed ground or station". Present day reefnetters are clearly operating outside the area referred to, and included in, the provisions of the Treaty; the Treaty does not apply to them nor should it be the basis for restricting their activities as they have been conducted in the past under state sanction and control.

#### CONCLUSION

Present day reefnetters are in no wise operating upon the "usual and accustomed grounds and stations" of the Lummis as the latter existed when the Treaty of Point Elliott was negotiated. The primitive fishing equipment

available to the Lummis at the time of the treaty negotiations were wholly incapable of fishing in the grounds now used by the present day reefnetters. The latter are but utilizing—and wholly without discrimination in any way toward the Lummis—a new fishing area developed by them in recent decades, which location is situated wholly outside of any marine area used by pre-treaty Indians.

Respectfully submitted,  
ASMUNDSON, RHEA & ATWOOD

By .....  
DAVID E. RHEA  
Of Attorneys for Petitioner  
Suite 5, Bellingham Legal Center  
805 Dupont Street  
Bellingham, Washington 98225  
(206) 733-3370



Supreme Court, U. S.

FILED

JAN 20 1976

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-705

WASHINGTON REEFNET OWNERS ASSOCIATION,

*Petitioner,*

v.

UNITED STATES OF AMERICA, *et al.*,  
*Respondents.*

BRIEF OF RESPONDENT LUMMI INDIAN TRIBE IN  
OPPOSITION TO PETITION OF WASHINGTON  
REEFNET OWNERS ASSOCIATION FOR A  
WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT

ZIONTZ, PIRTLE, MORISSET

ERNSTOFF & CHESTNUT

By ALVIN J. ZIONTZ

*Attorneys for Respondent  
Lummi Indian Tribe*

Office and Post Office Address:  
208 Pioneer Building  
600 First Avenue  
Seattle, Washington 98104  
Telephone: (206) 623-1255



## SUBJECT INDEX

	Page
Opinions Below .....	1
Jurisdiction .....	1
Questions Presented for Review .....	2
Treaties, Statutes, and Constitutional Provisions Involved .....	2
Statement of the Case .....	2
Proceedings Below .....	2
Summary of Facts .....	4
Argument .....	5
A. The Question Presented by the Petition is Entirely a Question of Fact and Is Therefore Not a Proper Basis for Granting Certiorari .....	5
B. The Record Abundantly Supports the Findings Relevant to This Petition .....	6
C. The Relief Granted Is Clearly Correct as a Matter of Law .....	9
Conclusion.. .....	10

## TABLES OF AUTHORITY

### Table of Cases

<i>United States v. Winans</i> , 198 U.S. 371 (1905) .....	9
--	---

### Constitutional Provisions

U.S. Const. art. VI .....	2
---------------------------	---

### Statutes

12 Stat. 927, art. V .....	2
28 U.S.C. § 1254(1) .....	1

**Other Authority**

	<i>Page</i>
Fed. R. Civ. P. 52(a) .....	8
Supreme Court Rule 19 .....	10
Supreme Court Rule 19(1) .....	6

IN THE  
**Supreme Court of the United States**

---

**October Term, 1975**  
**No. 75-705**

---

**WASHINGTON REEFNET OWNERS ASSOCIATION,**  
*Petitioner,*  
v.

**UNITED STATES OF AMERICA, *et al.*,**  
*Respondents.*

---

**BRIEF OF RESPONDENT LUMMI INDIAN TRIBE IN  
OPPOSITION TO PETITION OF WASHINGTON  
REEFNET OWNERS ASSOCIATION FOR A  
WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR  
THE NINTH CIRCUIT**

---

**OPINIONS BELOW**

The Opinion of the Ninth Circuit Court of Appeals is published at 520 F.2d 676. The District Court's Opinion appears at 384 F.Supp. 312. Both Opinions are included in the Appendix attached to the Petition filed with the Court by Petitioner State of Washington in the related cases, Numbers 75-588, 75-592.

**JURISDICTION**

The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in upholding the District Court's finding that the present reef net fishing area in Legoe Bay off Lummi Island is within the usual and accustomed grounds and stations of the Lummi Indians?

### TREATIES, STATUTES, AND CONSTITUTIONAL PROVISIONS INVOLVED

The Treaty of Point Elliott, January 22, 1855, 12 Stat. 927, Article V, provides:

The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the Territory . . .

Article VI, United States Constitution requires that:

. . . all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. . . .

### STATEMENT OF THE CASE

#### Proceedings Below

In September, 1970, the United States commenced litigation against the State of Washington on its own behalf and as trustee for several Indian tribes, charging that State statutes, regulatory provisions and practices were violative of the rights of Indians to fish in the waters of Western Washington as guaranteed to them in six treaties made between the tribes and the United States, including the Treaty of Point Elliott, *supra*. Shortly afterwards, a number of Indian tribes party to the treaty intervened as plaintiffs. The Lummi Indian Tribe was one of the intervenor-plaintiffs.

The Lummi complaint in intervention alleged, in addition to the general allegations of State violation of treaty rights, that non-Indians, operating under licenses issued by the State of Washington, had monopolized reef net locations at the Lummi's usual and accustomed grounds and had excluded them from reef netting, in violation of their treaty rights.

The Reefnet Owners Association intervened and claimed that they "enjoyed historic fishing rights" in the waters of Lummi Island, among other areas, and were entitled to continue using these rights under state law. The issue between the Lummis and the Reefnet Owners Association was stated in the final pretrial order as being: whether the sites of non-Indian reef net fishermen are on the usual and accustomed grounds and stations of the Lummi Indians; and, if so, whether these non-Indians have monopolized these grounds to the exclusion of the Lummi Indians.

The District Court found in the affirmative as to both issues after taking extensive evidence. (Fourteen findings of fact were made on the issues) The Court deferred for later consideration the relief to be afforded the Lummis.

The Petitioners appealed to the Ninth Circuit Court of Appeals on the issue between the Reefnet Owners and the Lummi Indians. That Court considered this issue separately from the general issues in the case between the State of Washington, the United States and the intervenor Indian tribes. The Ninth Circuit Decision upheld the District Court in its disposition of the claims of the Lummi Indian Tribe and specifically sustained its finding of fact that the reef net operations were within Lummi usual and accustomed grounds.

The question of whether the Reefnet Owners are fishing on Lummi usual and accustomed ground is brought to this Court only on the Petition of the Reefnet Owners and is not raised by any of the other parties.

### Summary of Facts

The technique of reef net fishing was developed by the Indians. Both the aboriginal and modern reef net operation employ the same basic principle developed and used by the aboriginal Lummis; namely, the creation of an artificial reef by means of ropes camouflaged with grass and other materials to give an appearance of a reef and to lead the migrating salmon upward into a net slung between two boats which is lifted when the fish enter the net. Modern gear incorporates numerous refinements and improvements, including the addition of electric power to pull the nets and heavy anchors and cables to hold the boats against tidal currents.

The Court found that Legoe Bay was one of the Lummi usual and accustomed reef net areas at the time of the making of the Treaty of Point Elliott. After the Treaty, the Indians continued to use these locations until about 1894 when fish traps operated by whites were installed so as to render valueless many of the Lummi reef net locations. The Court further found that as a result of the white's use of fish traps (now illegal under state law) and by the widespread use of other fishing gear, the fish had been driven from the shallower waters and now could only be taken in the deeper waters of the Bay.

The Court found that all Lummi reef net fishermen had been squeezed out of the fishery and that of the present

43 reef nets being operated in Legoe Bay, none was owned by a Lummi. These locations are occupied by members of the Petitioner association who occupy fixed positions on the grounds and maintain a "gentlemen's agreement" to the effect that they will not yield their location to anyone unless the occupant is willing to sell his equipment to a would-be purchaser. If the member does not desire to sell his equipment, no change in occupancy of the location can occur. There is no voluntary yielding of the location or rotation to other locations. Most importantly, the members of the reefnetter's association do not recognize Lummi Indians as having any treaty right to occupy a position on the reef net grounds, and as far as the Reefnet Owners are concerned, they would not concede that an Indian has any different right than a non-Indian seeking to acquire a location on these grounds.

#### ARGUMENT

**A. The Question Presented by the Petition is Entirely a Question of Fact and is Therefore Not a Proper Basis for Granting Certiorari**

The Petition states the question presented for review as follows:

Are the present-day reefnetters operating in what were, at treaty times, "usual and accustomed grounds and stations" of the Lummis?

The issue as stated by the Petition, is entirely a question of fact, and as such, is not a proper basis for granting of certiorari. Furthermore, the issue of fact involves only the Lummi Indian Tribe and the Washington Reefnet Owners Association—no other parties are involved.

The Petitioner urges that the question of whether its members are, *in fact*, fishing upon the "usual and accus-

tomed grounds and stations" of the Lummis presents "an important question of federal law". The assertion is wholly unsupported by anything in the Petition. An examination of the Petition itself fails to disclose any analysis or discussion of any question of law. Instead, the Petition deals entirely with evidentiary matters which are urged as warranting reversal of the District Court.

Like all such arguments, the recital adverts to items of evidence, testimony of witnesses, affidavits and the like, which is highly selective and omits contrary evidence and the larger context in which the evidence was taken. The argument does nothing more than invite the Court to reconsider evidence going to a narrow issue of fact which was decided contrary to the Petitioner's claims. The Petition therefore fails to meet the requirements of Rule 19(1) of the Rules of the Supreme Court and should therefore be denied.

#### **B. The Record Abundantly Supports the Findings Relevant to This Petition**

The Petitioner's claim is that their members are fishing in deeper waters than were fished by the Lummi Indians at treaty times by means of devices not in existence at treaty times, (even though within the waters of the same bay) and that they are not on "usual and accustomed grounds" as that phrase is used in the Treaty.

But the District Court found that at the time of the Treaty, the waters of Legoe Bay were a usual and accustomed reef net fishing ground of the Lummi Indians. That after the making of the Treaty, the Indians continued to reef net on these grounds until fish traps operated by whites substantially interfered with their operations. These traps

were outlawed by State law in 1934, but since the cannery which bought their fish had closed, they did not resume the fishery until 1939 when a new cannery opened. By this time however, non-Indians had entered the reef net locations. The non-Indians gradually squeezed out the few remaining Lummis, so that today no Lummi reef nets remain.

There are now 43 reef nets being operated in Legoe Bay. Although some positions in the fishery are vacant, they remain so because the sites are not productive. The location of the reef net is one of the most critical factors in the success of the operation and profitable positions are occupied permanently, unprofitable ones abandoned or operated intermittently or experimentally.

Most importantly, the Court found that the heavier volume of fish in the vicinity of Legoe Bay had travelled close to shore, but due to the installation of fish traps and the abundance of other fishing gear in the reef net area, the migratory path of the fish has changed so that now fish must be taken in deeper water.

In aboriginal times Indian fishermen, like all fishermen, shifted to those locales that seemed most productive at any given time, including the operation of the reef nets. Since treaty times, Indians and non-Indians have adopted new fishing techniques and gear. Indians no longer fish from dugouts just as non-Indians no longer fish from wooden sailboats. Indians no longer use bark nets and non-Indians no longer use cotton or linen nets. Acculturation of western Washington Indians into western culture began prior to treaty times and has continued to the present day. Modern gear incorporates numerous refine-

ments and improvements over the aboriginal Indian gear, including the addition of electric power to pull the net.

All the economic reef net locations are occupied by members of the Reefnet Owners Association so as to maintain an exclusive occupancy system. A member of the Lummi Tribe can reef net in a profitable location only by purchasing, from a present reefnet owner his fishing gear, *provided* such owner is willing to sell. No present-day Lummis are willing to contest any of the present occupants for possession of a reef net site nor are they willing to invest money in gear to occupy locations which are not economically productive. Lummi Indians would be interested in participating in the fishery if they had access to productive locations, but object to having to purchase a white reefnetter's fishing gear in order to occupy a good location.

The Court specifically found that some of the present-day non-Indian reef net gear in Legoe Bay is located directly over the stations occupied by the Lummis at treaty times and thereafter.

These findings are determinative of the claim of Petitioner that it's members' reef netting activities in Legoe Bay are not in contravention of the rights of the Lummi Indians under the Treaty of Point Elliott.

The Petitioners made the same contentions before the Ninth Circuit as they make in their Petition for Certiorari, but obviously failed to meet the burden of showing the District Court findings to be clearly erroneous, the standard which is applicable under Rule 52(a), Federal Rules of Civil Procedure. As the Ninth Circuit stated in its opinion:

Insofar as the district court thus concluded that usual and accustomed grounds and stations extended a suf-

ficient distance from shore into Legoe Bay to enable the Indians to harvest most productively the available fish, that finding is not clearly erroneous. The term "grounds" as used in the treaties denotes a broader dimension than "stations" and can readily be understood to include the distances from shore at which present reef netting is done.

520 F.2d 676, 692 (9th Cir. 1975)

**C. The Relief Granted is Clearly Correct as a Matter of Law**

Having found that the Legoe Bay reef net area is a Lummi usual and accustomed ground, the courts below ruled that Lummis could not be excluded from participating in the fishery on those grounds by "gentlemen's agreement" or otherwise. Instead, Lummis had a federally guaranteed treaty right to participate in the fishery on an equal basis with the non-Indians, and to enjoy the benefits of the principle of equal division which is applicable to other usual and accustomed areas.

Having found that the Petitioners are occupying all of the productive sites on the Respondent's usual and accustomed grounds the court below was clearly correct in concluding that the Respondents were entitled to equal access under the "in common with" clause of the Point Elliott Treaty. Nor could the Petitioners foreclose access to these grounds by virtue of their physical control of these stations within the grounds. *United States v. Winans*, 198 U.S. 371 (1905).

The District Court did not reach the question of the specific relief which would be granted to the Lummi Tribe in gaining access to this fishery, but left this for future determination by the court. The Ninth Circuit modified this by suggesting that in granting future equit-

able relief, "the district court should give regard wherever practicable to minimizing the resulting hardship to present white reef net fishermen". 520 F.2d 676, 692 (9th Cir. 1975)

### CONCLUSION

1. The Petition of the Washington Reefnet Owners Association should be denied because the only question which it raises is an issue of fact. That issue is one which directly affects only the Petitioner and this Respondent.
2. The factual arguments made by Petitioner were carefully reviewed by the Ninth Circuit which refused to disturb the lower court's findings and ruling on the issue. The District Court's findings of fact are abundantly supported by the evidence. Petitioner has failed to persuade the Ninth Circuit that the findings are "clearly erroneous" as required by the Federal Rules of Civil Procedure.
3. The Petition fails to demonstrate that the issue it raises is "an important question of federal law which has not been, but should be, settled by this court", nor does it demonstrate that the court of appeals decision "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision." (Rule 19, Supreme Court Rules)
4. The decision of the court below on the issue raised by the Petition is correct as a matter of law.

Respectfully submitted,

ZIONTZ, PIRTLER, MORISSET  
ERNSTOFF & CHESTNUT  
By ALVIN J. ZIONTZ

*Attorneys for Respondent  
Lummi Indian Tribe*

1234567890

1234567890